Supreme Court U.S.
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No. _____

In The

Supreme Court of the United States

SIMON BALDERAS, *et al.*,

Appellants,

v.

STATE OF TEXAS, *et al.*,

Appellees.

On Appeal To The United States District Court For The Eastern District Of Texas, Tyler Division

JURISDICTIONAL STATEMENT

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January 2002

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QUESTIONS PRESENTED

1. Is the one-person, one-vote equal protection standard for legislative districts satisfied by a state if it deliberately departs from achievable equality and instead establishes a 10% total maximum deviation among districts for the purpose of "partisan line-drawing"?

2. May a state, consistent with its duty to make an "honest and good faith effort" to apportion legislative districts "of as nearly equal population as is practicable," deliberately establish a total maximum deviation policy of up to 10% statewide without basing the resulting deviation on any neutral redistricting criteria rooted in state or federal law but instead as a way to further "partisan line-drawing"?

3. Does the 10% *de minimis* standard of *Brown v. Thompson* immunize any state legislative reapportionment plan that falls below the 10% threshold even though substantial portions of the plan are demonstrably unrelated to any articulated or rational state policy?

LIST OF PARTIES

Plaintiffs and Plaintiff-Intervenors:

1. Simon Balderas
2. Roman Torres
3. Gilberto Torres
4. Brian Manley
5. Frank D. Sandoval Jr.
6. Eugene Pack
7. Honorable Tom DeLay
8. Honorable Joe Barton
9. Honorable John Culberson
10. Associated Republicans of Texas
11. John Denoyells
12. Morris Overstreet
13. Boyce T. Breedlove
14. David Brown
15. David O. Zambrano
16. Joy Smith
17. Vivian Harris
18. Tony Campos
19. Ed Gonzales
20. Margaret P. Rodriguez
21. Michael Moon
22. Don Pedroza
23. Pauline Dixon
24. Rafael Quintanilla
25. Hargie Faye Savoy
26. Ralph McCloud
27. Dianna Villasana

LIST OF PARTIES – Continued

28. Gina Dixon
29. Alex Vidales Sr.
30. George Rios
31. Roy Stanley
32. Phyllis Cottle
33. Dorothy M. Lee
34. Molly Woods
35. Texas League of United Latin American Citizens
36. J. B. Mayfield
37. Ledbetter Neighborhood Association
38. Williamson County, Texas
39. Texas Farm Bureau Mutual Insurance Company
40. Roy Millner
41. Bonnie Breazeale
42. Bennie Escobar
43. Denise Escobar
44. William R. Leo
45. Jesse Diaz
46. Lulac 4496 of Dallas
47. Congresswoman Eddie Bernice Johnson
48. Stephan Leroy Honore
49. Henry Martinez
50. Atascosa County, Texas
51. Bell County, Texas
52. Grayson County, Texas
53. Johnson County, Texas
54. Wichita County, Texas
55. Texas State Conference of NAACP Branches
56. Texas Coalition of Black Democrats
57. Art Murillo
58. Charles E. Vinn Sr.
59. Juanita Valdez-Cox
60. Leo Montalvo
61. Rolando Arriola

LIST OF PARTIES – Continued

62. Emily Amps
63. Louis Laster
64. Terry Meza
65. Latino and African-American Voters
66. Residents of Tarrant County Texas
67. Congressman Kevin Brady
68. Congressman Sam Johnson
69. Gene Green
70. Sheila Jackson Lee
71. Nicholas Lampson
72. Lester Bellow
73. Homer C. Guillory
74. Willie Davis
75. John Bland
76. Mexican-American Legislative Caucus, Texas House of Representatives
77. Guy C. Jackson III
78. John Archer
79. Howard County, Texas
80. Phil Sudan
81. Congressman Ken Bentsen
82. The Texas Legislative Black Caucus

Defendants and Defendant-Intervenors:

1. State of Texas
2. Rick Perry-Governor of Texas
3. James "Pete" Laney, Speaker of the Texas House of Representatives
4. Henry Cuellar, Secretary of State of Texas
5. Susan Weddington, Chair of Texas Republican Party
6. Molly Beth Malcolm, Chair of Texas Democratic Party
7. William Owens Jr.
8. Bill Ratliff, Lieutenant-Governor of Texas
9. John Cornyn, Attorney-General of Texas

LIST OF PARTIES – Continued

10. Carol Keeton Rylander, Comptroller of Public Accounts of Texas
11. David Dewhurst, Texas Land Commissioner
12. Geoffrey S. Conner

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

THE QUESTIONS ARE SUBSTANTIAL AND PLENARY REVIEW SHOULD BE GRANTED 8

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Brown v. Thompson, 462 U.S. 835 (1983)..8, 9, 13, 14, 16

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996).....16, 17

Growe v. Emison, 507 U.S. 25 (1993).....4

Hulme v. Madison County, No. 01-CV-0456-DRH (S.D. Ill. 2001).....15

Karcher v. Daggett, 462 U.S. 725 (1983).....14

Kilgarlin v. Hill, 387 U.S. 120 (1967).....2

Kilgarlin v. Martin, 252 F.Supp. 404 (S.D. Tex. 1966), *rev'd on other grounds sub nom. Kilgarlin v. Hill*, 387 U.S. 120 (1967).....2

Mahan v. Howell, 410 U.S. 315 (1973).....8, 10, 12

Roman v. Sincock, 377 U.S. 695 (1964).....7, 8, 14, 15

Terrazas v. Clements, 581 F.Supp. 1319 (N.D. Tex. 1983).....7

White v. Regester, 412 U.S. 755 (1973).....6

STATUTES

28 U.S.C. § 1253.....1

28 U.S.C. § 1343.....1

28 U.S.C. § 2281.....1

28 U.S.C. § 2284.....1

TABLE OF AUTHORITIES – Continued

Page(s)

42 U.S.C. § 1973c 4

42 U.S.C. § 1983 4

CONSTITUTIONS

Art. III, Section 2, Texas Constitution 2

Art. III, Section 25, Texas Constitution 2, 3

Art. III, Section 28, Texas Constitution 2, 5

Tex. Op. Atty. Gen. M.W. 350 (1981) 7, 13

U.S. Const., amend. XIV 4

U.S. Const., amend. XV 4

OPINIONS BELOW

The opinions and orders of the court below are not yet reported. They are reproduced in the attached Appendix. They consist of: The order of the three judge court declining to delay further the trial of the state senate case, and to proceed without the state court's involvement, of October 11, 2000 (App. 15). Per Curiam opinion of the Court (App. 1) and the concurring opinion by Hannah, District Judge (App. 11).

STATEMENT OF JURISDICTION

The action below was brought to enjoin enforcement of a redistricting statute of the State of Texas enacted by the Legislative Redistricting Board of Texas pursuant to Article III, Section 28 of the Texas Constitution. This appeal concerns only a challenge to the Board's reapportionment of the Texas Senate. Jurisdiction of the three judge district court was invoked under 28 U.S.C. §§ 1343 and 2281. The date of the judgment sought to be reviewed is November 28, 2001. Notice of Appeal was filed on December 19, 2001 in the United States District Court for the Eastern District of Texas, Tyler Division. The jurisdiction of this Court to review the judgment of the district court is founded on 28 U.S.C. § 1253, this being a matter required to be heard by a district court of three judges pursuant to 28 U.S.C. § 2284.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 25 of the Texas Constitution provided at the time the LRB enacted its Senate reapportionment plan:

Senatorial Districts. The State shall be divided into Senatorial Districts of contiguous territory according to the number of [qualified electors]*, as nearly as may be, and each district shall be entitled to elect one Senator; [and no single county shall be entitled to more than one Senator.]*

* The bracketed portions had been declared unconstitutional in *Kilgarlin v. Martin*, 252 F.Supp. 404 (S.D. Tex. 1966), *rev.d on other grounds sub nom. Kilgarlin v. Hill*, 387 U.S. 120 (1967). In November 2001, the voters of Texas approved a constitutional amendment to Section 25 and it now reads:

"The State shall be divided into Senatorial Districts of contiguous territory and each district shall be entitled to elect one Senator."

Article III, Section 2 of the Texas Constitution provides in pertinent part:

"The Senate shall consist of thirty-one members, and shall never be increased above this number . . . "

Article III, Section 28 of the Texas Constitution provides:

TIME FOR APPORTIONMENT; APPORTIONMENT BY LEGISLATIVE REDISTRICTING BOARD. The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the

state into senatorial and representative districts, agreeable to the provisions of Section 25, 26, and 26-a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have the force and effect of law. Such apportionment shall become effective at the next succeeding state-wide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be

entitled to receive per diem and travel expense during the Board's session in the same manner and amount they would receive while attending a special session of the Legislature.

Other constitutional provisions and statutes involved are the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment to the Constitution of the United States; Title 42, United States Code, Sections 1973c and 1983.

STATEMENT OF THE CASE

Appellants, known below as the Mayfield intervenors, appeal from a final judgment rendered by a three judge district court sitting in the Eastern District of Texas, Tyler Division. Multiple lawsuits arose in Texas following the 2000 census. The suits challenged the districting of Texas' congressional seats and both houses of the Texas legislature. The federal cases were consolidated into the earliest filed federal action, *Balderas v. Texas*, No. 6:01-CV-158. The trial court, in keeping with *Growe v. Emison*, 507 U.S. 25 (1993), deferred proceedings to permit the Texas state courts to act on the issues.

When the state court failed to proceed (App. 20), the three judge court conducted separate trials, and entered separate judgments, with respect to the challenges to the redistricting of the Texas legislative bodies and the state's congressional delegation. This appeal concerns only the challenge to the redistricting of the Texas Senate. The three judge court denied all relief, including plaintiffs' requested injunction (App. 1). The final judgment in the

Senate challenge was entered on November 28, 2001. Timely notice of appeal was filed by the plaintiff-intervenors who pursue this appeal. This jurisdictional statement is submitted to show that the Supreme Court has jurisdiction of this appeal and that a substantial question is presented.

The Texas Legislature was unable to enact redistricting legislation during its 2001 session. That failure triggered the convening of the state's Legislative Redistricting Board (LRB) in keeping with the provisions of Article III, Section 28 of the Texas Constitution. The LRB is composed of five elected state officials, the Attorney General, Comptroller of Public Accounts, Commissioner of the General Land Office, Lieutenant Governor and Speaker of the Texas House of Representatives. The LRB by a 3 to 2 vote enacted a redistricting bill for the Texas Senate. That enactment will govern the 2002 elections and is the subject of this appeal.

Central to this appeal is the approach to the issue of population equality. The LRB adopted "Redistricting Guidelines" that provided "Equality in Population. Senate Election districts shall be approximately equal in population. The total maximum deviation in population of a redistricting plan must be less than 10% statewide." It was the State's approach, as expressed in its brief to the trial court, that "there is no legal obligation for a legislative body such as the LRB to draw a plan with less than 10% deviation." The Board's senate apportionment plan reflects just such an attitude. The top to bottom deviation is 9.71% and the deviations that emerge are not linked to any rational explanation or articulated policy. For example, as described in Judge Hannah's concurrence, the 17th

and 4th Senate districts divide Jefferson County. The 17th was described by the state's expert as "weird, odd and bizarre" and according to Judge Hannah, requires "travel by boat to meet the standards of contiguity." Even with this absurd configuration the 17th district is overpopulated by 29,937 persons or 4.45% and the adjoining 4th district is underpopulated 16,772 persons or 2.49%. This pattern is repeated elsewhere in the urban districts – meaningful deviations emerge that are explainable only, as the court concluded, because the districts are "plainly the product of partisan line drawing."

The ideal size of a Texas Senate district is 672,639 persons. The trial record establishes the obvious. It would have been simple to draw Texas Senate districts of minimum deviation. Indeed the Texas Congressional Districts, which are slightly smaller than the senate seats, were drawn to zero deviation. Several demonstration plans offered at trial provided less than 1% deviation for the Texas Senate. While Texas law requires preservation of county lines in the apportionment of the Texas House of Representatives there is no similar requirement that applies to Senate redistricting.

In fact, in earlier incarnations, the LRB has proceeded on the assumption that it was obligated to minimize deviation in Texas Senate seats.

The LRB was first convened in Texas in 1971, the results of that effort were before this Court in *White v. Regester*, 412 U.S. 755 (1973). The Senate phase of the case was not appealed but was fully litigated in the trial court. The trial record in *Regester*, and in the present matter, shows that the LRB in 1971 sought to minimize deviation

in Senate apportionment, and with the somewhat primitive data available produced a Senate plan with a top to bottom deviation of some 5%. The LRB was next convened in 1981. At that time an Attorney General's opinion was rendered with respect to the issue of tolerable deviation in Texas Senate apportionment. Then Attorney General White concluded that Texas Senate districts "must . . . be as nearly of equal population as practicable." Tex. Op. Atty. Gen. M.W. 350 (1981). The LRB that year drew Senate districts with a top to bottom deviation of approximately 2%. The final Senate plan that year was the product of a consent decree, *Terrazas v. Clements*, 581 F.Supp. 1319 (N.D. Tex. 1983). The State has not contended, indeed it would be difficult to do so, that there was a historical basis for the current approach to Senate redistricting.

The trial court rejected our claims that the LRB plan failed the test of *Roman v. Sincock*, 377 U.S. 695 (1964), because it was not "free from any taint of arbitrariness or discrimination." The trial court also assumed that the state could appropriately target 10% deviation as an adequate approximation of population equality:

> Showing only that smaller deviations were possible is insufficient to prove a violation of the Equal Protection Clause. We cannot say that this plan, which satisfies the Voting Rights Act and contains less than 10% deviation is so without reason as to violate the Equal Protection Clause. It is plainly the product of partisan line-drawing.

In all fairness, our record shows a great deal more than that "smaller deviations were possible." The record not only shows that the deviations were, as the court

concluded, "the product of partisan line-drawing", but it is also evident that the LRB used race as a conscious factor in its "partisan line drawing" manipulating minority populations throughout the state's urban areas, as noted by Judge Hannah in his concurrence. Finally, of course, it is admitted that the LRB made no effort to draw districts "as nearly of equal population as practicable."

THE QUESTIONS ARE SUBSTANTIAL AND PLENARY REVIEW SHOULD BE GRANTED

The State of Texas assumed, and the trial court appeared to agree, that the death knell has sounded for this Court's rulings, and reasoning, in *Mahan v. Howell*, 410 U.S. 315 (1973) and *Roman v. Sincock*, 377 U.S. 695 (1964). We say this not simply because of the population deviations contained in the reapportionment plan in question, but rather because of the assumption that there is no obligation on the part of the State to make a "good faith effort" toward population equality. The State's brief to the trial court asserted "There is no legal obligation for a legislative body such as the LRB to draw a plan with less than 10% deviation. See *Brown*, 462 U.S. at 842." State Defendants' Trial Brief at 8. Similarly, the state's expert, and only trial witness, testified to the view that any deviation under 9.99% was acceptable, no matter the reason. These conclusions by Texas are based upon *Brown v. Thompson*, 462 U.S. 835 (1983). Certainly *Brown* can be read for the proposition that a 10% deviation in a state legislative apportionment plan is "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment". 462 U.S. at 842. It is quite

more to leap to the Texas view that anything under 10% deviation is unassailable.

By its own admission the State made no effort at population equality: rather, it sought only what it saw to be the "safe harbor" of 10% deviation. The State then used this flexibility to produce a Senate plan which in the words of the trial court "is plainly the product of partisan line-drawing." The most egregious example is Senate District 17 described in Judge Hannah's concurring opinion: " . . . a district described even by the State's own expert witness as weird, odd and bizarre. Stretching over 180 miles . . . it is barely a mile wide in spots, and requires travel by boat to meet the standards of contiguity. . . . In Jefferson County, it splits the community of Port Arthur from its suburbs and, more importantly from Beaumont. The district lines show a careful encompassment of the small Black community within Port Arthur while rejecting the larger Black bordering community of Beaumont." (App. 12). This district moving westward completely excluded the Black community of Galveston, Texas, splitting the city and county.

Undisputed trial testimony proved that this split in Jefferson County fractured a long established cohesive Black voting community. On the deviation side of the issue, District 17 is overpopulated by 29,937 persons or 4.5%, and the abutting District 4 in Jefferson County is underpopulated by 16,772 persons or 2.49%. The total variance from the ideal between districts 4 and 17 is 46,709. Perhaps this appears minor, but the reality is that many cities in Texas are much smaller than 40,000 persons and the ideal legislative district at issue in Virginia

in *Mahan v. Howell*, 410 U.S. 315 (1973) was 46,485. Percentages should not obscure the fact that we are talking about affecting real people in significant numbers. The appendix (App. 24) includes a map of Senate District 17, and its neighborhood in the hope that its "bizarre" nature will be readily perceived.

Not only does Senate 17 offend the eye, but it also reflects an utter repudiation of one of the few objective criteria that the LRB purported to honor, i.e. the preservation of cities and towns as communities of interest. The trial record contains the transcripts of the hearings held by the LRB. The Chair of the LRB was Attorney General Cornyn, one of the 3 board members who approved the Senate plan. Chairman Cornyn expressed on several occasions the importance of preservation of towns and cities in the redistricting process. At the hearing of July 16: "And, as I told you and I told everyone, one of my objectives was to try make sure we split cities and towns as little as probable (sic). That was one of the objective criteria." (T. of 7-16-2001 hrg., at 39; see also p. 194.) Again, General Cornyn: "Hard for me to imagine – exemplifying a community of interest more than a town or city." (T. of 6-26-2001 hrg., at 61). These objective standards flew out the window in District 17, as noted by Judge Hannah (App. 13), and as established by the record: "we . . . deplore the State's rejection of traditional redistricting principles such as compactness, respect for political subdivisions, and communities of interest. 6 County lines are cut by this district and no whole county is included. Further, District 17 splits 17 or 18 towns and cities in its meander through the coastal plane of southeastern Texas."

We have focused on the particulars of Senate District 17 because it does seem the most egregious. But, in fact, El Paso County in far West Texas is another example of abandonment of any rationality by the LRB. El Paso County has a population of 679,622, virtually an ideal sized senate district, as noted by Judge Hannah. (App. 11-12). El Paso is the only county of the some 80 counties in West Texas that is fragmented by the LRB plan. As found by Judge Hannah, "the State unnecessarily splits El Paso County into Districts 29 and 19" and places 38,832 "residents of southern El Paso County in District 19 along with 335,367 persons from Bexar County, hundreds of miles away and of a different community of interest." (*Id.*). In fact, this district is over five hundred (500) miles from East to West. The result is that Senate District 29, rather than being at 1% deviation, is underpopulated by 4.73%.

The LRB also violated its own procedural rules in its haste to pursue its partisanship. At the outset of the LRB proceedings, a rule was adopted that forbade consideration of any plan, or plan amendment, that had not been available to the public for at least 24 hours. This rule went over the side when it came to redrawing the districts in Tarrant County, which encompasses the City of Fort Worth. Here, the LRB was apparently determined to eliminate the significant minority vote in Fort Worth's Senate District 12 and spread that vote between adjoining Tarrant County districts. At the outset of the process, Senate District 12 had a combined Black and Hispanic minority population of 47.3%, at the end of the process the minority component had been reduced to 19% and

this minority population divided between two other Tarrant districts, Districts 9 and 10. The bulk of these minorities ended up in District 10 which became overpopulated by 32,236 persons, a deviation of 4.79%, while adjoining District 12 was left underpopulated. The amendment that produced this configuration was offered and adopted at the last minute, without the required public notice or comment, much less hearing. This amendment, as well as the amendment redrawing District 17 "was introduced by a last minute amendment, and voted on by Legislative Redistricting Board over the strong objection of Lieutenant Governor Ratliff who deplored the lack of fairness inherent in voting on an amendment which the public [did] not have a chance to see." (App. 14). Ultimately Lieutenant Governor Ratliff, one of the four Republicans on the Board and House Speaker Laney voted against the LRB plan.

Similar race-based moves adversely affected Senate Districts 2 in Dallas and 15 in Houston. The LRB consciously used race as the basis for line-drawing throughout these districts. The trial court felt itself powerless to address the cynical irrationality that taints the LRB Senate apportionment, concluding: "We cannot say that this plan, which satisfies the Voting Rights Act and contains less than 10% total deviation is so without reason as to violate the Equal Protection Clause. It is plainly the product of partisan line-drawing." (App. 8-9).

As an initial matter, it is clear that the Senate apportionment scheme is not the result of "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Mahan v. Howell*, 410 U.S. 315, 325 (1973). As a

factual matter, as our record establishes, with today's technology structuring districts of equal population is a simple computer exercise. The State does not suggest that it sought equality, rather it argues that there "is no legal obligation for a legislative body such as the LRB to draw a plan with less than 10% deviation. See *Brown*, 462 U.S. at 842." State Defendants' Trial Brief at 8. To us this argument takes *Brown* farther than the actual opinion would support. Aside from the four dissenters in *Brown*, there was a concurrence by Justices O'Connor and Stevens which expressed the view: "the 'one-person, one-vote' principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes. In both situations, however, ensuring equal representation is not simply a matter of numbers. There must be flexibility in assessing the size of the deviation against the importance, consistency, and neutrality of the state policies alleged to require the population disparities." 462 U.S. at 848.

Here, of course, there are no "state policies" at play, other than the "partisan line-drawing" found by the trial court. We know from the record that when the LRB was convened in 1971 and 1981, albeit with different office holders, that the state policy was to minimize deviation in Senate districts, roughly 5% in 1971 and less than 2% in 1981. We also know that the only Texas Attorney General Opinion issued on the subject concluded that Texas Senate districts should be "as nearly of equal population as practicable." Tex. Op. Atty. Gen. M.W. 350 (1981). There is no historical support for the current approach to deviation, and no "consistency" of state policy.

Justice Powell's plurality opinion for the Court in *Brown* is more cautionary than the Texas reading. The opinion is careful to note that the deviations "advance a rational state policy" and are "free from any taint of arbitrariness or discrimination" and that "there is no evidence of a built-in bias tending to favor particular political interests or geographic areas." 462 U.S. at 843-44. The LRB Senate plan fails on each of these counts. The only articulated state policy, preservation of cities and towns, was routinely violated whenever it was expedient to achieve the goal of "partisan line-drawing" and the resulting population deviations flow directly from those partisan considerations. The LRB senate plan is a far cry from the reasoning expressed by Justices Powell and O'Connor in their opinions in *Brown*.

The Texas LRB did precisely what was rejected by the Court in *Karcher v. Daggett*, 462 U.S. 725 (1983), as regards congressional redistricting, and cautioned against by the Court in *Roman* v. *Sincock*, 377 U.S. 695 (1964) with respect to legislative districts. The LRB took 10% deviation as *de minimis* and made that the target rather than equality of population. In *Karcher*: "Adopting any standard other than population equality . . . would subtly erode the Constitution's ideal of equal representation. If state legislators knew that a certain *de minimis* level of population was acceptable, they would doubtless strive to achieve that level rather than equality." 462 U.S. at 731. In *Roman*:

> "Our affirmance . . . is not meant to indicate approval of the District Court's attempt to state in mathematical language the constitutionally permissible bounds of discretion in deviating

> from apportionment according to population. In our view the problem does not lend itself to any such uniform formula, and it is neither practical nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." 377 U.S. at 710.

The LRB had before it a multitude of proposed redistricting plans that adhered to population based redistricting. Rejecting these plans in favor of "partisan line-drawing" taints the result with "arbitrariness or discrimination" in the words of *Roman*.

At least two federal courts have confronted this issue of the effect of the presumption accorded a plan that falls within the 10% range. Most recently a federal district court sitting in the Southern District of Illinois voided the redistricting plan for Madison County, Illinois. *Hulme v. Madison County*, No. 01-CV-0456-DRH (S.D. Ill. 2001). The plan at issue had a total deviation of 9.3%, and the trial court reasoned that it must determine whether the plan was "tainted by arbitrariness or discrimination." (Sl.Op. at 8). The court found that the plan architect's "primary objective was to construct a map with a population deviation within the 'target' of less than 10% with a coincidental goal to create districts that would not simply

disadvantage Republican members of the Board, but 'cannibalize' their districts to the greatest extent possible." (Sl.Op. at 15). Upon these findings District Judge Herndon concluded there was "a prima facie case of discrimination, Defendants must justify the population disparity." The defendants there, much like the LRB, took the position that a plan within the 10% range was unassailable and offered no explanation for the deviations. As a result the Court held the plan to be violative of the Equal Protection Clause of the Fourteenth Amendment. (Sl.Op. at 16).

The Fourth Circuit in *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) fashioned a similar analysis, an analysis most certainly contrary to the Texas view that "there is no legal obligation for a legislative body . . . to draw a plan with less than 10% deviation." *Daly* concerned the Board of Commissioners, as well as the Board of Education of Mecklenburg County, and issues of one-person, one-vote. The North Carolina General Assembly had adopted legislation modifying the single member districts for those Boards, and the resulting districts contained a population deviation of 8.33%. The Court concluded that the 10% "*de minimis* threshold recognized in *Brown* does not completely insulate a state's districting plan from attack of any type. Instead, that level serves as the determining point for allocating the burden of proof in a one person, one vote case." 93 F.3d at 1220. The Circuit Court remanded to enable the plaintiffs to offer evidence that the "apportionment plan was the product bad faith, arbitrariness, or invidious discrimination." 93 F.3d at 1222. It being the view of the court, among other matters, that

"for deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an 'honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.' . . . However this is a rebuttable presumption." 93 F.3d at 1220.

Where does this leave the parties? We have a Texas Senate plan that "is plainly the product of partisan line-drawing." (App. 9). One of these "partisan" districts is District 17, described by the state's expert witness as "weird, odd and bizarre" (App. 12). The map of the district amply confirms this characterization. (App. 24). The same witness also testified that it was not a district he would have drawn as the state's consultant, and that he did not think the district represented good redistricting principles. The two districts involved (17 and 4) unnecessarily split Jefferson County for the first time in history, and produce in District 17 an overpopulation of 29,937 persons and in the abutting District 4 underpopulation of 16,772 persons. No one has suggested, nor could they reasonably, that these deviations were the result of any good faith effort at population equality. Finally, despite the State's announced goal of preserving towns and cities as communities of interest, as described by Judge Hannah District 17 "requires travel by boat to meet the standards of contiguity" and rejects "traditional redistricting principles such as compactness, respect for political subdivisions, and community of interests. 6 county lines are split by this district and no whole county is included. Further, district 17 splits 17 or 18 towns and cities in its meander through the coastal plains of southeastern Texas." (App. 12). Such findings smack strongly

of bad faith and arbitrariness and certainly belie any notion of good faith effort at population equality.

Texas urges, successfully so far, that the historic notion of a good faith effort to achieve population equality is no more, it has been replaced by an obligation to hold deviation under 10% and there "is no legal obligation for a legislative body such as the LRB to draw a plan with less than 10% deviation." Further, the state would say that so long as it remains within the 10% range it may freely engage in "partisan line-drawing" even if the final product offends every notion of traditional districting principles.

CONCLUSION

The Mayfield appellants believe that the issues presented are of consequence. Among other questions: what is the "taint of arbitrariness or discrimination" that must be shown to call into question a state's redistricting scheme and is there truly no longer an obligation on the part of the states to make a "good faith effort" to "construct districts . . . as nearly of equal population as is practicable"? We respectfully urge plenary review.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	CIVIL ACTION
	§	
vs.	§	NO. 6:01CV158
	§	
STATE OF TEXAS, ET AL.	§	(Filed Nov. 28, 2001)

This Filing Applies to: All Actions

Before HIGGINBOTHAM, Circuit Judge, HANNAH and Ward, District Judges.

PER CURIAM:

This phase of the case involves the redistricting of the Texas State Senate following the 2000 census. Following the failure of the state legislature to implement a redistricting plan for the Senate, the Legislative Redistricting Board adopted a plan on July 24, 2001, to redistrict the 31 Senate seats.[1] Because Texas is a "covered" jurisdiction under section 5 of the Voting Rights Act, the State then submitted this plan to the United States Department of Justice for preclearance.[2] On October 15, 2001, the United States Department of Justice informed the Texas Secretary of State that the LRB Senate plan, known as 1188S, had been precleared pursuant to section 5 of the Voting Rights Act. This three-judge court then heard evidence on November 5 and 6, 2001, supplementing the evidence taken at the congressional redistricting

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[1] *See* Tex. Const. art. III, § 26.

[2] *See* 42 U.S.C. § 1973c.

trial and challenging the legality of the LRB Senate plan, 1188S, under the Equal Protection Clause and the Voting Rights Act. We will first describe the course of this litigation and then address the parties' challenges to the LRB Senate plan. We repeat in part our description in our opinion adopting a congressional redistricting plan.[3]

I

Voters and various officeholders filed multiple lawsuits in state and federal court challenging the districting of Texas' congressional seats and both houses of the state legislature based on the 2000 census.[4] The federal cases were consolidated into the earliest-filed federal action, *Balderas v. Texas*, No. 6:01-CV-158, before this three-judge court.[5]

The Texas Constitution requires that the Texas legislature, "at its first regular session after the publication of each United States decennial census, apportion the state

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[3] We filed a plan for congressional districts with an opinion on November 14, 2001. We directed entry of a final judgment on those claims at that time.

[4] *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex.); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex.); *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County, Tex.); *Cotera v. Perry*, No. GN-101660 (353rd Dist. Ct., Travis County, Tex.); *Connolly v. Perry*, No. GN-102250 (98th Dist. Ct., Travis County, Tex.); *Associated Republicans of Texas v. Cuellar*, No. 2001-26894 (281st Dist. Ct., Harris County, Tex.); *Rivas v. Cuellar*, No. 2001-33760 (152nd Dist. Ct., Harris County, Tex.).

[5] Other three-judge courts had dismissed prior suits filed prematurely.

into senatorial and representative districts."[6] The Constitution also provides that, "[i]n the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas," which is "composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office."[7] In May 2001, the 77th Legislature adjourned *sine die* without enacting Senate and House redistricting plans and so the LRB convened and adopted Senate and House redistricting plans on July 24, 2001. Under state law, these plans, "executed and filed with the Secretary of State, shall have force and effect of law."[8]

Pursuant to the Supreme Court's direction in *Grove v. Edison*,[9] on July 23, 2001 we deferred proceedings in federal court until October 1, 2001. Proceedings on the congressional redistricting concluded on November 2, 2001 and our order issued on November 14, 2001.

After a pre-trial conference on November 2, 2001, trial on the Senate plan commenced on November 5, concluding with arguments on November 6. Post-trial briefs were submitted on November 9, 2001. After reviewing the evidence and the parties' submissions, we

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[6] Tex. Const. art. III, § 28.

[7] *Id.*

[8] *Id.*

[9] 507 U.S. 25 (1993).

now turn to our decision on the challenges presented to the state Senate redistricting plan adopted by the LRB and precleared by the Justice Department.

II

Federal courts have a limited role in considering challenges to precleared legislatively-adopted redistricting plans.[10] The Supreme Court has made clear that "[a] State should be given the opportunity to make its own redistricting decisions so long as that is practically possible and the State chooses to take the opportunity," and, "[w]hen it does take the opportunity, the discretion of the federal court is limited except to the extent that the plan itself runs afoul of federal law."[11] We may reject the State's apportionment plan only insofar as it is deficient as a matter of federal law and may only act remedially to correct any such deficiency.[12]

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[10] *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

[11] *Lawyer v. Dep't of Justice*, 521 U.S. 567, 576-77 (1997); *see also Upham v. Seamon*, 456 U.S. 37, 40 (1982) (per curiam) (holding that a three-judge court cannot "simply substitute[ ] its own reapportionment preferences for those of the state legislature").

[12] *Cook v. Luckett*, 735 F.2d 912, 919 (5th Cir. 1984); *see also Voinovich*, 507 U.S. at 156 ("[T]he federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law.").

To the extent the plaintiffs raise claims that ask that this court enforce state law against the State, they are barred by the Eleventh Amendment, and this court has no jurisdiction to hear them, whether for injunctive or for declaratory relief. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121 (1984); *Watson v. Texas*, 261 F.3d 436, 440-41 (5th Cir. 2001); *Earles*

III

The parties presented competing plans for redistricting the Senate seats, but, as we have explained, our task is simply to evaluate whether the precleared LRB Senate plan runs afoul of the statutory and constitutional law, specifically the Equal Protection Clause of the Fourteenth Amendment and sections 2[13] and 5[14] of the Voting Rights Act.

A

Several plaintiffs urge that the LRB plan violates the Voting Rights Act. The Balderas plaintiffs argue that section 2 of the Voting Rights Act requires that we draw in a seventh Latino citizenship majority district in South Texas. The Valdez-Cox plaintiffs argue that a Latino majority district should be created in Dallas and Tarrant Counties. The Mayfield plaintiffs challenge the LRB plan's Senate districts in Dallas, Harris, Tarrant, and Jefferson Counties, seemingly arguing for the creation of minority "influence" districts under section 2 of the Voting Rights Act. The Mayfield plaintiffs also argue that the LRB plan impermissibly "packs" existing majority-minority districts at the expense of neighboring minority districts with less than a majority-minority population. Amicus curiae Texas NAACP argues for a third African-

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v. State Bd. of Certified Public Accountants of La., 139 F.3d 1033, 1039-40 (5th Cir. 1998); *Hays County Guardian v. Supple*, 869 F.2d 111, 125 (5th Cir. 1992).

[13] 42 U.S.C. § 1973.

[14] 42 U.S.C. § 1973c.

American opportunity district in Harris County and argues that the LRB Senate plan dilutes minorities in certain "influence districts," 4, 12, and 15.

Looking first to the Balderas and Valdez-Cox plaintiffs' claims, we must reject these claims for reasons substantially similar to those given in our decision in the congressional redistricting case. The record before us demonstrates that the Latino population is not sufficiently compact or numerous to support another, effective majority Latino citizenship district in Dallas and Tarrant Counties or in South Texas.[15] We further find that, under the totality of the circumstances, the failure to create a seventh Latino majority district will not prevent full and equal Latino participation in the political process. Rather, creating such a district would risk giving rise to retrogression in the existing Latino majority districts. We conclude that the these plaintiffs have failed to prove that section 2 of the Voting Rights Act requires any correction to the LRB Senate plan based on allegations of Latino vote dilution.

To the extent the Mayfield plaintiffs and amicus curiae Texas NAACP invite us to recognize and sustain a challenge to the LRB plan based on minority "influence districts," we have no warrant to do so.[16]

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[15] *See Grove*, 507 U.S. at 39-40; *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986); *NAACP v. Fordice*, 252 F.3d 361, 365-67 (5th Cir. 2001).

[16] *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1995); *see also Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994) (declining to decide whether "influence district" claims are cognizable under section 2 and citing three prior cases in which the Court similarly declined to so decide).

Texas NAACP has similarly failed to identify in the record a violation of Section 2 of the Voting Rights Act so as to compel the creation by this court of an African-American opportunity district in Harris County. The new minority opportunity districts in the Texas NAACP's proposed plan 1219S, District 12 in Dallas and Tarrant Counties and District 15 in Fort Bend and Harris Counties, rely on supposed coalitions of Latino and African-American populations to achieve majority-minority populations. Amicus points to suggestions that Latinos and African-Americans have voted cohesively in certain Democratic primaries. The evidence before us, however, does not persuade us that Latinos and African-Americans vote cohesively as required by *Thornburg v. Gingles*[17] so as to constitute a majority in a single-member district.[18]

We are also not persuaded by the Mayfield plaintiffs' packing claims. The addition of minority, particularly Latino, populations to several districts was necessitated by the one-man, one-vote requirement and non-retrogression concerns pursuant to section 5 of the Voting Rights Act. To the extent minority populations were added to majority-minority districts under the LRB plan, such as the movement of Latinos from El Paso County between former District 29 and new District 19, the evidence demonstrates that these shifts in population were in keeping with the demands of the Equal Protection Clause and the Voting Rights Act.

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[17] 478 U.S. 30, 50-51 (1986).

[18] *See Grove*, 507 U.S. at 41; *Valdespino*, 168 F.3d at 852-53.

To the extent that we have jurisdiction to do so we find that there is no retrogression in violation of section 5 of the Voting Rights Act in the LRB Senate plan. As we have noted, the Justice Department has precleared the LRB plan.

B

The Mayfield plaintiffs argue that the LRB plan is unconstitutional because its population deviation violates the Equal Protection Clause. We note first that the LRB plan presents a total deviation under ten percent. As such, the plaintiffs cannot establish a *prima facie* case of vote dilution in violation of Equal Protection Clause, and the State is not required to justify minor variations in various districts from the ideal Senate district population.[19]

The Mayfield plaintiffs, in attempting to meet their burden of proof, contend that the LRB plan is unconstitutional under *Ronan v. Sincock*[20] because it is not "free from any taint of arbitrariness or discrimination."[21]

Showing only that smaller population deviations were possible is insufficient to prove a violation of the Equal Protection Clause.[22] We cannot say that this plan, which satisfies the Voting Rights Act and contains less than 10% total deviation is so without reason as to violate

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[19] *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000).

[20] 377 U.S. 595 (1964).

[21] *Id.* at 710.

[22] *See id.* at 1221 (citing authorities).

the Equal Protection Clause. It is plainly the product of partisan line-drawing.

C

The Valdez-Cox plaintiffs also urge that Hidalgo County and particularly the City of McAllen be left whole in contrast to the LRB Senate plan, which splits Hidalgo and McAllen between Districts 26 and 27. They argue that splitting these political subdivisions violates the narrowly-tailored approach mandated by Supreme Court case law dealing with court-ordered plans or modifications targeted at correcting Voting Rights Act or constitution violations.[23] The LRB plan, however, is not a court-ordered remedial plan, so these arguments are inapposite. On the evidence presented, the splitting of Hidalgo County in the LRB plan does not violate the Voting Rights Act. Whether the decision to split Hidalgo County is wise or unwise as a matter of legislative policy is not for us to say.

D

The Mayfield plaintiffs also urge a federal due process challenge to the LRB plan. They have not briefed this matter in their post-trial briefs, but argued this matter in their post-trial briefs, but argued at trial that the violation arises from the LRB's failure to follow its own guidelines in adopting its plan. This issue has not been preserved and, in any event, our reading of the guidelines and the proceedings before the LRB disclose no due process violation.

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[23] *See Upham*, 456 U.S. at 43; *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1973).

E

Various parties argue that certain districts, in particular Senate District 17, are unconstitutional as purposeful racial discrimination in violation of the Equal Protection Clause. We find no such violation. As one of the political scientists testified, "it isn't pretty," it's just political gerrymandering.

IV

We conclude that there is no meritorious challenge, based on federal constitutional or statutory law to the LRB Senate plan, 1188S, nor any state law challenge over which this three-judge court has jurisdiction. As such, we held that 1188S, as enacted into law by the LRB, governs state Senate apportionment for the State of Texas following the 2000 census. There being no reason for delay, we direct entry of final judgment in this case pursuant to Federal Rule of Civil Procedure 54(b).

Each member of this panel joins in this ruling but reserves the right to express more fully their separate views in a later opinion.

So **ordered** and **signed** this 28th day of November, 2001.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	CIVIL ACTION NO. 6:01 CV 158
VS.	§	(Filed Nov. 30, 2001)
STATE OF TEXAS, ET AL.	§	

This Filing Applies to: All Actions

JOHN HANNAH, JR., Chief District Judge, having concurred in the judgment, writes further.

I have concurred with the legal conclusion reached by my brethren in regard to the House and Senate Redistricting Plan. I write separately to express my shock at the drawing of districts by the State of Texas. The dominant political party treated all members of the opposing party as if they were "enemies of the State" instead of respected state leaders, many with a great wealth of governmental knowledge and ability that has and could inure to the benefit of Texas.

The State has obviously ignored traditional redistricting principles in favor of political expediency. The State's lack of respect for political subdivisions is evident. Two examples from the State's Senate Plan will suffice although many examples from the House and Senate Plan could be cited.

El Paso County's population according to the 2000 Census is 679,622. The population figure for an ideal

senate district is 672,639. A respect for political subdivisions would suggest making El Paso County into a single senatorial district. However, the State unnecessarily splits El Paso County into Districts 29 and 19. It places the residents of southern El Paso County in District 19 along with 335,367 persons from Bexar County, hundreds of miles away and of a different community of interest.

Even more offensive is Senate District 17, a district described even by the State's own expert witness as weird, odd and bizarre. Stretching over 180 miles from University Park in Harris County to the Louisiana border, it is barely a mile wide in spots, and requires travel by boat to meet the standards of contiguity. Starting in University Park and Bellaire, in Harris County, Anglo enclaves within the borders of the City of Houston, it snakes west through a narrow corridor to another Anglo enclave of middle and upper middle class homes in the western suburbs of Houston, out to the edge of Anglo Katy. It wends its way south into another exclusive Anglo stronghold in the First Colony area of Fort Bend County, carefully avoiding the sections of Black population in bordering Missouri City while retaining the Anglo populations of Missouri City. After wending its way south through the Anglo portions of Fort Bend County, it reaches into Brazoria County. It then veers northeast along a narrow strip of Galveston County, taking in the Anglo community of Jamaica Beach and a narrow part of the City of Galveston which borders the beach, but draws its line at the neighborhood of Galveston which contain a large Black population. The district continues its northeast direction along the coast of Chambers County, where its main inhabitants are the birds in the Anahuac

National Wildlife Refuge, the population maps showing zero for human inhabitants in District 17's section of Chambers County. Travel from the Galveston portion of this district into the Chambers County portion of this district, if eschewing a route into District 4, requires a trip on the Bolivar Perry onto the Bolivar Peninsula. The District ends in Jefferson County, at the border of Louisiana. In Jefferson County, it splits the community of Port Arthur from its suburbs and, more importantly from Beaumont. The district lines show a careful encompassment of the small black community within Port Arthur while rejecting the larger Black bordering community of Beaumont.

Examining District 17, referred to in the trial of this case as the "fish hook," we note its extremely irregularity on its face and deplore the State's rejection of traditional redistricting principles such as compactness, respect for political subdivisions, and community of interests. 6 county lines are split by this district and no whole county is included. Further, District 17 splits 17 or 18 towns and cities in its meander through the coastal plane of southeastern Texas.

The evidence concerning the lack of regard for traditional communities of interest was compelling. Jefferson County residents testified that they are often adverse to residents of Harris County on issues of air pollution and water rights and that the working class communities of Jefferson County have nothing in common with the middle and upper middle class suburbs of Houston or with exclusive University Park. There was testimony that Jefferson County has been wholly within one senate district for the last 168 years.

Further, evidence showed that District 17 as it now stands, was introduced by a last minute amendment, and voted on by the Legislative Redistricting Board over the strong objection of Lieutenant Governor Ratliff who deplored the lack of fairness inherent in voting on an amendment which the public had not have a chance to see.

All this being said, the federal courts have a limited role in considering challenges to precleared, legislatively-adopted redistricting plans. We may not substitute our judgment for that of the Legislature, in this case, the Legislative Redistricting Board, unless we find that the plan runs afoul of federal law. The State may engage in political gerrymandering even if it "so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact."[1] However, I concur with the legal conclusion that plaintiffs have failed to meet their evidentiary burden of showing that the Texas Senate plan violates the Constitution or laws of the United States, as distasteful as portions of it may be.

SIGNED this 30th day of November, 2001.

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
Chief District Judge

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[1] *Hunt v. Cromartis*, 526 U.S. 541, 551 (1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SIMON BALDERAS, ET AL.	§	
Vs.	§	NO. 6:01CV158
STATE OF TEXAS, ET AL.	§	

This Filing Applies to: All Actions

ORDER

(Filed Oct. 11, 2001)

I

Pursuant to the Supreme Court's direction in *Growe v. Emison*, on July 23, 2001 we issued an order deferring redistricting proceedings in federal court, until October 1, 2001.[1] We directed that the hearing of evidence on such a plan would begin on October 15, 2001, in Tyler, Texas, and prescribed the pre-trial process to occur between those dates. This schedule was adopted to reduce, if not avoid, any delay in the electoral process and to follow the specific command of the Supreme Court in *Growe*.

On October 1, 2001, at the request of the state trial judge before whom the state case was pending, we extended the deadline for the filing of a congressional redistricting plan to October 3, 2001. On October 3, 2001, the state trial court issued a plan, known as 1065C. No provision was made in our October 1 order for the filing of any new plan, although the state trail [sic] judge

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[1] The parties' suggested dates for the end of the period of deferral ranged only from October 1 to October 15.

advised that he might modify the plan on or before October 10, 2001. The parties were under orders of this court to file statements of position by 11:00 a.m. Friday, October 12, 2001 and exchange their experts' reports and proposed exhibits by 3:00 p.m. Thursday, October 11, 2001, all pointed at plan 1065C.

This schedule did not contemplate major changes in the state court plan filed on October 3. On October 10, 2001, the state court nonetheless issued a new plan, known as 1089C. As we explained, this new plan filed after the deadline for state proceedings frustrates the pre-trial schedule outlined to the parties in our order of July 23 and further detailed in our order of October 5, 2001.

II

We are persuaded that under *Growe*, plan 1089C must be the only candidate for a baseline state plan in this case. Plan 1065C no longer is valid. While beginning anew without a timely state plan would be consistent with our original deadlines, the teaching of *Growe* persuades us to accept plan 1089C as the only candidate.

Predictably, several parties now request that the trial of the congressional redistricting matter be continued. It bears emphasis that all parties have been aware since July 23 that our October 1 deadline was meant to allow time for the State, through its agencies (including its courts), to produce a plan. The parties were on notice that they would have approximately two weeks to analyze any state plan before trial. This was adequate, given the familiarity of the parties with these issues and the supporting computer program, all enhanced by the reality

that the parties have already tried the congressional redistricting matter to the state court. That is, moving to a new state plan did not return the parties to the starting line.

Although the state court's new plan makes more difficult the goal of avoiding delay of the state elections at issue, and could be ignored as outside the time period of deferral, we decline to do so. At the same time, consistency and fairness counsel for continuation of the trial to give the parties the time originally allowed for preparation of their cases, including experts' reports and proposed exhibits.

We therefore continue this trial until Monday, October 22, 2001 at 9:00 a.m.. Trial will be held in the Homer Thornberry Federal Building in Austin, Texas, absent any objection to this location by the parties. The pre-trial conference set for October 12, 2001 is cancelled, and the pre-trial conference is re-set to October 19, 2001 at 3:00 p.m. in Tyler, Texas. The deadlines for exchanging experts' reports and exhibits and for filing position statements, the joint pre-trial order, summaries of state court evidence, and objections to proposed exhibits is extended to October 18, 2001 at 3:00 p.m.

III

Concerns have been expressed over the validity of the state plan absent preclearance by the Justice Department under Section 5 of the Voting Rights Act, 42 U.S.C. § 1783c. We will not take under submission any challenges to plan 1089C absent any required preclearance. We will, however, allow the parties to commence their

case in order to reduce disruption in the electoral process. At the same time we will await any required preclearance before finally closing the evidence, and before taking the case under submission.

The parties will request that the Department of Justice expedite preclearance of plan 1089C in an effort to parallel the implementation of the plan for the state legislature. Should the State's present plan for the state legislature be precleared, no further preclearance of that plan will be required. We would then expect to complete our work on the redistricting of the state legislature by late November, and the congressional districting as well, should any required, and expedited preclearance of the congressional plan be obtained by that time.

IV

We have previously ordered that trial on the state legislative districts would begin as soon as practicable after the trial of the congressional case had concluded and that we would conduct a joint hearing with the state trial court in Austin, Texas.

Given the delay just described and the further delay of any preclearance of a new state plan created by the state trial court, we will now proceed to hear the legislative redistricting cases in Austin, Texas, without the state trial court. To do otherwise would only ensure a delay in the elections. That result does not serve federalism and is not the teaching of *Growe*. We intend no criticism of the conscientious efforts of our able State colleague. This part of our cooperative effort has just been overcome by events.

So ordered and signed this 11th day of October, 2001.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNTIED STATES DISTRICT
JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT
JUDGE

Cause No. GN-100812

David Brown, David O. Zambrano, and Joy Smith, Plaintiffs	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
v.	§	
Rick Perry, in his capacity as Governor of the State of Texas; Bill Ratliff, in his official capacity as Lieutenant Governor of the State of Texas; James "Pete" Laney, in his official capacity as Speaker of the Texas House of Representatives; Henry Cueller, in his official capacity as Secretary of State for the State of Texas; Molly Beth Malcolm, in her official capacity as Chair of the Texas democratic Party; and Susan Weddington in her official capacity as Chairperson of the Texas Republican Party, Defendants	§	261st JUDICIAL DISTRICT

Cause No. GN-102285

Boyce T. Breedlove, Plaintiff	§	IN THE DISTRICT COURT
v.	§	OF TRAVIS COUNTY, TEXAS
Rick Perry, in his capacity as Governor of the State of Texas; Bill Ratliff, in his official capacity as Lieutenant Governor of the State of Texas; James "Pete" Laney, in his official capacity as Speaker of the Texas House of Representatives; Henry Cueller, in his official capacity as Secretary of State for the State of Texas; Molly Beth Malcolm, in her official capacity as Chair of the Texas Democratic Party; and Susan Weddington in her official capacity as Chairperson of the Texas Republican Party, Defendants	§	(Filed Oct. 24, 2001)

ORDER ON MOTION FOR TRIAL SETTING

On this day came to be considered a Motion for Trial Setting filed by Speaker Laney. Having considered the motion and the responses on written submission, the Court is of the opinion that the motion should be

DENIED. Such motion is denied for the following reasons:

1. There are important state law questions involved in the state legislative redistricting cases under Article III, § 26 of the Texas Constitution. These issues should be addressed by the court that decides this case.

2. This court previously heard a similar request that the state court should convene a state court trial on the state law issues in advance of the federal court trial. That request was granted, and the trial was scheduled to begin on October 1, 2001, well in advance of the federal court deadline for state action.

3. Prior to the commencement of the state court trial, this court was contacted by the federal court and requested to consider a joint state-federal trial of all issues involved in the state legislature redistricting cases. After considering that request from the federal court, this court agreed. A joint trial was scheduled and the state trial setting established by this court was postponed.

4. After the date of this court's trial setting had passed, this court was notified by the federal court that it had changed its mind and would not be conducting a joint trial with this court.

5. This court was notified of the federal court's change of mind too late for this court to reschedule the state court trial prior to the federal court's deadline.

6. The federal court's deadline for state house and senate redistricting has passed.

7. The three-judge federal court panel announced its intention to commence the state house and senate redistricting trial immediately following the conclusion of its congressional redistricting trial, which is currently underway.

8. The uncertainty of the length of the congressional redistricting trial presents scheduling difficulties for both this court and the parties.

9. The parties should address any remedy for this problem to the federal court.

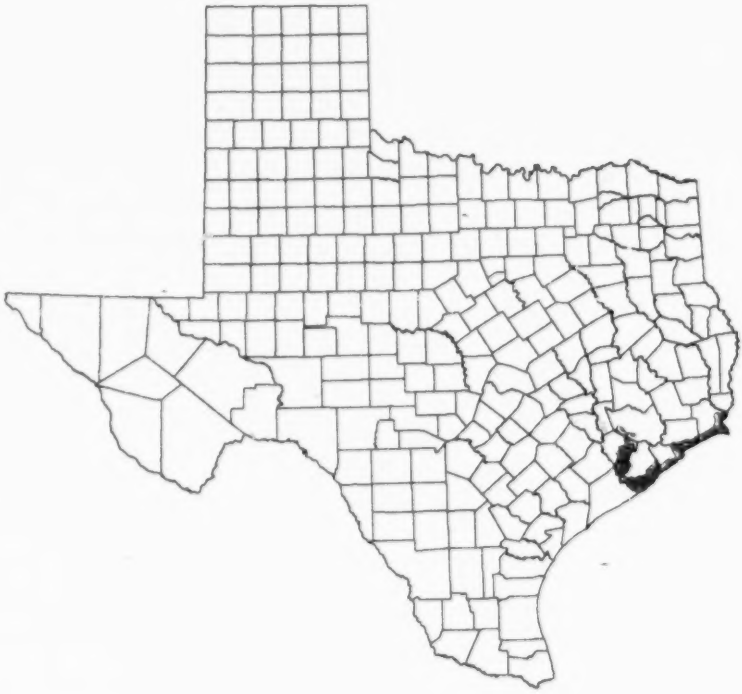
SIGNED this 24th day of October, 2001.

/s/ Paul Davis
PAUL DAVIS
JUDGE PRESIDING

DISTRICT 17

State Senate Districts

LRB Adopted for 2002 Elections - PLAN 01188 S



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Supreme Court U.S.
FILED
MAR 4 2002
OFFICE OF THE CLERK

No. 01-1126

In the Supreme Court of the United States

J.B. MAYFIELD, *et al.*,
Appellants,
v.
STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Is a state legislative redistricting plan with an overall population deviation of less than 10%—the level this Court has recognized as *de minimis*—subject to challenge simply because the legislative decision was partially influenced by partisan considerations?

2. Did the three-judge panel correctly reject Appellants' population-based challenges given that the Legislative Redistricting Board's Texas Senate Plan has a *de minimis* overall population deviation?

LIST OF PARTIES

Appellants list both Henry Cuellar, in his capacity as Texas Secretary of State, and Geoffrey S. Connor, in his capacity as Acting Texas Secretary of State, as parties to the action below. Neither are parties to this appeal, however, as the current Texas Secretary of State is Gwyn Shea.

Former Texas Secretary of State Cuellar was originally named in his official capacity as a defendant below, but he resigned from office in late 2001. Geoffrey S. Connor then served as Acting Secretary of State, and he automatically substituted for Secretary Cuellar in the proceeding below. FED. R. CIV. P. 25(d)(1). For this appeal, however, the current Secretary of State, Gwyn Shea, is automatically substituted in her official capacity. SUP. CT. R. 35.3.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Argument 2

I. The Questions Presented Are Not Substantial and the Court Should Summarily Affirm 2

A. Appellants' Population-Based Challenges Against the LRB's Senate Plan Fail Because the Plan's Overall Population Deviation Is Less Than 10% 2

B. The Legislative Body's Consideration of Partisan Factors Does Not Render the Plan Arbitrary or Invidiously Discriminatory 3

C. There Is No Support for Appellants' Theory That the LRB Focused on the 10% *De Minimis* Standard Rather Than Population Equality 6

Conclusion 8

TABLE OF AUTHORITIES

Cases **Page**

Brown v. Thompson, 462 U.S. 835 (1983) 2

Chen v. City of Houston, 206 F.3d 502 (CA5 2000), *cert. denied*, 121 S.Ct. 2020 (2001) 3

Connor v. Finch, 431 U.S. 407 (1977) 2

Daly v. Hunt, 93 F.3d 1212 (CA4 1996) 3, 6, 7

Davis v. Bandemer, 478 U.S. 109 (1986) 4, 5

Gaffney v. Cummings, 412 U.S. 735 (1973) . . . . . *passim*

Hulme v. Madison County, No. 01-CV-0456-DRH (S.D. Ill. Nov. 28, 2001) (unpublished) 6, 7

Roman v. Sincock, 377 U.S. 695 (1964) 3

White v. Regester, 412 U.S. 755 (1973) 2

White v. Weiser, 412 U.S. 783 (1973) 4

Wright v. Rockefeller, 376 U.S. 52 (1964) 4

Statutes, Rules, and Constitutional Provisions

FED. R. CIV. P. 25(d)(1) ii

SUP. CT. R. 18.12 8

SUP. CT. R. 18.6 1

SUP. CT. R. 35.3 ii

In the
Supreme Court of the United States

J.B. MAYFIELD, *et al.*,
Appellants,

v.

STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Secretary of State Gwyn Shea (collectively "the State") move to affirm the judgment rendered by the three-judge panel on the ground that the question presented is so insubstantial as not to require further argument. SUP. CT. R. 18.6.

STATEMENT OF THE CASE

The State objects to the argumentative tone and conclusory statements in Appellants' statement of the case. Instead of relying on Appellants' statement of the case, the State directs the Court to the statement of proceedings set out in the three-judge court's opinion, which is a fair recitation of the proceedings leading up to this appeal. J.S., App. at 1-4.[1]

1. Appellants' Jurisdictional Statement will be cited as "J.S."

ARGUMENT

I. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

A. Appellants' Population-Based Challenges Against the LRB Senate Plan Fail Because the Plan's Overall Population Deviation Is Less Than 10%.

It is undisputed that the overall population deviation of the Legislative Redistricting Board (LRB) Senate Plan is 9.71%. J.S. at 8. Appellants argue that the LRB offered no justification for this overall deviation when a zero-percent deviation was possible. But as the three-judge court correctly held, this challenge is easily defeated by the Court's jurisprudence.

Population deviations amounting to less than 10% are *de minimis* and establish a *prima facie* presumption of validity. *See, e.g., Brown v. Thompson*, 462 U.S. 835, 842 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977). As the Court explained in *Brown*,

> "'minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.' Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." 462 U.S., at 842 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), and citing *Connor*, 431 U.S., at 418; *White v. Regester*, 412 U.S. 755, 764 (1973)).

Because the Senate Plan has an overall population deviation of less than 10%, the plan is *prima facie* lawful and the deviation requires no further justification. *See id.*; *see also Gaffney*, 412 U.S., at 745.

Appellants argue that no rational state policy or neutral redistricting criteria excuses the 9.71% deviation, but their complaint is misplaced. If the population deviation falls below the 10% threshold, the plan is entitled to a presumption of validity and "the districting body will not be required to justify minor deviations." *Chen v. City of Houston*, 206 F.3d 502, 522 (CA5 2000), *cert. denied*, 121 S.Ct. 2020 (2001) (citing *Gaffney*, 412 U.S., at 749-54).

Appellants erroneously allege that the presumption should have been rebutted because the Senate Plan has the "taint of arbitrariness or discrimination." *See Roman v. Sincock*, 377 U.S. 695, 710 (1964)). But Appellants' primary support for this allegation is the mere assertion that smaller population discrepancies were achievable. This is insufficient to establish the kind of arbitrary, invidious discrimination required to rebut the presumption of validity that attaches when a plan's overall deviation is less than 10%. *See Gaffney*, 412 U.S., at 740-41 (stating that if deviations are *de minimis*, the "additional fact that another plan could be conceived with lower deviations among the State's legislative districts" does not rebut the presumption of lawfulness); *see also Daly v. Hunt*, 93 F.3d 1212, 1221 (CA4 1996). This Court's jurisprudence, therefore, precludes Appellants' argument.

B. The Legislative Body's Consideration of Partisan Factors Does Not Render the Plan Arbitrary or Invidiously Discriminatory.

Appellants also attempt to rebut the plan's presumptive lawfulness by arguing that population deviations are the result of partisan line-drawing, as evidenced by at least one "bizarre" district. This claim fails in light of the Court's decision in *Gaffney*, which rejected a virtually identical challenge to a Connecticut state plan. 412 U.S., at 751-53 & n.18.

First, the Court recognized that "partisan line-drawing" was an inevitable consequence of legislative districting efforts:

> "We are quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward." *Id.*, at 752 (citations omitted).

Similarly, the Court rejected the argument that "bizarrely" shaped districts were the result of political line-drawing, noting that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Id.*, at 752 n.18 (citing *White v. Weiser*, 412 U.S. 783 (1973); *Wright v. Rockefeller*, 376 U.S. 52, 54 (1964)); *cf. Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("[W]here unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination.").

The impact of politics on district lines is an inevitable consequence of redistricting:

> "It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may

> pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney*, 412 U.S., at 752-53.

Similarly, Appellants' other complaints about districts being under- or over-populated must fail because all implicate deviations well below the 10% threshold. J.S. at 11-12. Such *de minimis* deviations, even if influenced in part by partisan considerations, are constitutionally immaterial absent specific evidence establishing that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Davis*, 478 U.S., at 132. Appellants have not, and cannot, substantiate such a claim. And their general objection that partisan politics invaded the districting process does not state a viable constitutional challenge. *See Gaffney*, 412 U.S., at 751-53.

The Court should decline Appellants' invitation to equate the mere existence of political considerations in the districting process with arbitrariness or invidious discrimination. Such an approach would plunge the Court into the "political thicket," compelling the type of judicial second-guessing of state legislatures that the Court has steadfastly rejected. *Id.*, at 749-50.

In *Gaffney* and *Davis*, the Court recognized that political considerations by a legislative body are an inevitable part of the districting process, and the Court appropriately rejected partisan-based constitutional challenges in both of these cases. Here, too, the Court should reject Appellants' partisan-based claims and affirm the judgment of the three-judge court.

C. There Is No Support for Appellants' Theory That the LRB Focused on the 10% *De Minimis* Standard Rather Than Population Equality.

The Court should reject Appellants' unsupported allegation that the LRB's goal was to satisfy the 10% *de minimis* standard rather than achieve population equality. Simply because the State defended the plan on the ground that it fell within a *de minimis* deviation of less than a 10% does not mean the LRB cast aside population-equality concerns in favor of this 10% "target"; and, it certainly does not invalidate the presumptive lawfulness of the plan.

In essence, Appellants ask the Court to disregard the Senate Plan's presumptively lawful, less-than-10% deviation and to infer, instead, that the lack of *perfect* population equality signals invidious political motives. That approach flips the Court's jurisprudence on its head and defeats the very purpose of the *de minimis* threshold: to preserve legislative responsibility for redistricting and to avoid courts' becoming "bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S., at 749-51. There is no support for Appellants' unprecedented inversion of this Court's well-established principles.

Appellants misplace reliance on the Fourth Circuit's decision in *Daly v. Hunt* and the Southern District of Illinois's unpublished decision in *Hulme v. Madison County*—neither of which support Appellants' argument.[2] Contrary to Appellants' assertion, these cases do not establish that a state plan is "tainted by arbitrariness or

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2. The unpublished decision in *Hulme v. Madison County*, No. 01-CV-0456-DRH (S.D. Ill. Nov. 28, 2001), cannot be found on Westlaw and is apparently available only as a slip opinion on the Southern District of Illinois website, at http://www.ilsd.uscourts.gov/opinions2.cfm?JID=3.

discrimination" if partisan line-drawing occurs. J.S. at 15-16. Rather, they confirm that a *de minimis* deviation can be challenged only through independent proof of invidious discrimination or another constitutional or Voting Rights Act violation (*i.e.*, something other than the population deviation itself).[3] *Daly*, 93 F.3d, at 1220-21; *Hulme*, slip op. at 7 (quoting *Daly*, 93 F.3d, at 1220) (requiring independent evidence that the "apportionment process had a taint of arbitrariness or discrimination."). No such independent evidence exists with respect to the LRB Senate Plan, and that plan's presumptive validity remains intact.

Fundamentally, Appellants seek to mire the Court in case-specific, evidentiary issues that are inappropriate for this Court's review. The LRB produced a Senate Plan that was precleared by the Department of Justice and upheld by the three-judge court based on this Court's well-established precedent. Appellants had ample opportunity to present evidence of invidious discrimination at trial, yet they failed to do so—presumably because no such evidence exists. The Senate Plan is constitutional, and the three-judge court correctly rejected Appellants' challenges to that plan.

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3. In *Daly*, the Fourth Circuit remanded the case to the district court to determine whether the requisite, independent evidence of invidious discrimination existed. 93 F.3d, at 1222. In *Hulme*, the district court determined that independent evidence of coercion and other bad acts during the districting process established a prima facie case of discrimination. *Hulme*, slip op. at 12-15.

CONCLUSION

The Court should summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

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